Supreme Court, U.S.
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No. 00-1837

IN THE

Supreme Court of the United States

JAMES NELSON, *et al.*,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY;
EL PASO TENNESSEE PIPELINE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the District Court's exclusion of the expert testimony of Drs. Kaye H. Kilburn and Alan R. Hirsch because their opinions and the methodology on which the opinions were founded failed to satisfy Federal Rule of Evidence 702 and the standards adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

STATEMENT PURSUANT TO RULE 29.6

El Paso Corporation (formerly El Paso Energy Corporation), which is publicly owned, is the parent corporation of and owns 100% of Respondent El Paso Tennessee Pipeline Co. Respondent El Paso Tennessee Pipeline Co. owns 100% of Respondent Tennessee Gas Pipeline Company.

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported at *Nelson v. Tennessee Gas Pipeline Company*, 243 F.3d 244 (6th Cir. 2001). The opinion of the United States District Court for the Western District of Tennessee is reported at *Nelson v. Tennessee Gas Pipeline Company*, No. 95-1112, 1998 U.S. Dist. LEXIS 22,769 (W.D. Tenn. Aug. 31, 1998).

STATEMENT OF THE CASE

I. Introduction

Petitioners' "Statement of the Case" contains numerous misstatements, omissions of fact, and alleged facts not contained in the record below. Petitioners' "Statement of Facts" — which is in fact, argument — is barely more than an assemblage of quotations, without meaningful context, regarding polychlorinated biphenyls (PCBs). Respondents provide the following statement of facts and summary of the proceedings below.

II. Statement of Facts

Respondent Tennessee Gas Pipeline Company ("TGPC") operates a natural gas pipeline that runs from the Gulf Coast to New England. TGPC has compressor stations at various points along its pipeline, including one in Lobelville, Tennessee, known as Station 79. The purpose of Station 79, like TGPC's other compressor stations, is to restore pressure to the natural gas as it passes through the pipeline, so that the natural gas continues to flow downstream. (Joint App. Vol. I, p. 243).

From 1954 until 1969, TGPC purchased a lubricant called Pydraul from Monsanto for use at Station 79. (Joint App. Vol. IV, pp. 1873-74). This lubricant contained PCBs. (Joint App. Vol. I, p. 244). In 1978, nine years after the last purchase of Pydraul for Station 79, Congress generally banned the production and sale of PCBs, as well as their use, except in a totally enclosed manner. *See* Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2020 (1976) (codified at 15 U.S.C. § 2605(e)(2)(A)); *see also General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997).

Plaintiffs in this case consist of a group of residents and former residents of Perry County, Tennessee, who, at one time or another, allegedly lived in or near the town of Lobelville, home of TGPC's Station 79.

III. Proceedings Below

Petitioners are incorrect in stating that this case is a class action. It is not. This case is not now — and has never been — certified as a class action. In this one action there are 166 individual plaintiffs who allege that they suffered a variety of injuries as a result of exposure to PCBs from Station 79. Pursuant to the parties' agreement, the plaintiffs selected seven individuals to act as "flagship plaintiffs," with their claims to be decided first. Also pursuant to the parties' agreement, the resolution of the claims of those seven flagship plaintiffs was assigned to Magistrate Judge J. Daniel Breen. On motion of Respondents, Magistrate Judge Breen excluded the plaintiffs' two causation expert witnesses and subsequently granted summary judgment in favor of Respondents, dismissing the seven flagship plaintiffs' claims. The plaintiffs appealed and the Sixth Circuit affirmed in all respects, finding no abuse of discretion by Magistrate Judge Breen in excluding plaintiffs' causation experts. Petitioners' Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I. Petitioners Assert No Compelling Reasons for a Grant of Certiorari.

Petitioners fail to state, much less provide support for, any compelling reason for a grant of certiorari in this case. Petitioners neither allege nor demonstrate that any of the well established grounds established by this Court for granting certiorari are present. Petitioners' chief concern is that the District Court ruled against them on the question of whether to exclude Drs. Kilburn and Hirsch. The District Court's and the Sixth Circuit's application of a properly stated rule of law, however, is not grounds for granting certiorari.

This Court, through Supreme Court Rule 10 and in various opinions granting certiorari, has set forth various compelling reasons for which the Court may grant certiorari.[1] None are present in this case:

- The decision of the Sixth Circuit does not conflict with a decision of another circuit on the issue of exclusion of expert testimony.

- The decision of the Sixth Circuit does not decide an important federal question that conflicts with a decision of the Tennessee Supreme Court.

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1. Supreme Court Rule 10, reflecting longstanding Supreme Court practice, states, "A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 goes on to set forth a list, though not exhaustive, of factors that may enter into the Court's decision whether to grant a petition for certiorari. The five factors set forth in Rule 10(a) and (c) are relevant to the issue of certiorari in this case; Rule 10(b) addresses only decisions by state courts of last resort. *See id.*

- Neither the Sixth Circuit nor the District Court departed from the accepted and usual course of judicial proceedings; thus, this Court's supervisory power need not be exercised.

- The Sixth Circuit did not decide an important issue of federal law that has not, but should be, decided by this Court.

- The decision of the Sixth Circuit does not conflict with any decisions of this Court.

See SUP. CT. R. 10. Petitioners have not asserted or proved that these or any other compelling reasons are present in this case.

Far from providing compelling reasons for granting certiorari, Petitioners focus almost solely on their argument that the methodologies of Drs. Kilburn and Hirsch were "the same scientific methodology used by the PCB scientific community." (Pet. at 28). Although the extensive record in this case proves that in fact these doctors failed to use accepted methodologies, Petitioners miss the point. Even if the doctors' methodologies were utilized by other scientists, both courts below found that the methodologies used were wholly inadequate to establish specific causation for the plaintiffs in this action.

The methodologies of Petitioners' expert witnesses were flawed even by their own admission:

- Dr. Kilburn admitted that his methodology and testing do not allow him to determine whether an

alleged impairment results from PCBs or some other "neurotoxin."[2] (Joint App. Vol. III, pp. 1314, 1316).

- Dr. Hirsch, like Dr. Kilburn, testified that his examination and testing could not determine the cause of an alleged illness and had no explanation for how he eliminated a host of other admitted causes of the plaintiffs' alleged injuries. (Joint App. Vol. V, 2232-34, 2271-76, 2318-2447).

- Dr. Kilburn admitted that he was unaware that the plaintiffs had been exposed to many of the confounders to which Dr. Kilburn had, in other cases, attributed the same neurological injuries allegedly received by the plaintiffs from PCBs; for example, long term, high volume use of alcohol, tobacco, and various drugs; plus, occupational and environmental exposures to a variety of "neurotoxins." (*See, e.g.*, Joint App. Vol. III, pp. 1284-85, 1327, 1652; Vol. III-IV, pp. 1460-1851; Vol. IX, pp. 4242-43; Vol. X, pp. 4334-35).

- Neither Dr. Kilburn's individual reports on the plaintiffs nor his so-called epidemiological study on

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2. In addition to Dr. Kilburn's admission that his methodologies do not establish specific causation, he also claims that virtually everyone has suffered neurological injuries as a result of being exposed to an omnipresent array of toxins. Dr. Kilburn advocates that so many things are causing so much "chemical brain damage" that "[t]he slow destruction of our brains is an oozing lesion that, if not stopped, threatens to destroy our civilization." Indeed, according to Dr. Kilburn, addressing this alleged crisis "should be the long-sought unifying force to federate world governments. Our fellow inhabitants of the earth must heed this call to arms." (Joint App. Vol. III, pp. 1428-31).

the Lobelville plaintiffs mention any "statistical analysis for testing confounding factors" (Pet. at 24-25; *see* Pet. at 2-3). (Joint App. Vol. III-IV, pp. 1448-1837).

- Dr. Kilburn admitted that he was not aware of any scientific literature that uses the same battery of neuropsychological and neurophysiological tests that he does. (Joint App. Vol. III, pp. 1373-74). Dr. Kilburn also admitted that there are no agreed upon norms for many, if not most, of the tests he used in this case. (Joint App. Vol. IX, pp. 4238-41, 4244).

- Drs. Hirsch and Kilburn were unable to cite any scientific literature supporting their claims that PCBs are even capable of causing many of the illnesses they blamed on them in this action. (Joint App. Vol. III, p. 1373; Vol. V, pp. 2254-63, 2264-65, 2269, 2281-83, 2294).

- Petitioners themselves admitted that Dr. Kilburn's opinions are novel, urging the District Court to admit them anyway because "there has to be a *first* time for everything." (Joint App. Vol. V, p. 2667) (emphasis added).

- Dr. Kilburn's so-called Lobelville epidemiological study stacked the deck, *inter alia*, by rejecting nine out of sixteen of his national control groups merely because their test scores were similar to the plaintiffs'; according to Dr. Kilburn, that didn't mean the plaintiffs were normal, it meant that the control groups had also been injured by some unidentified toxin. Dr. Kilburn conceded, however, that the nine

national control groups he rejected did not believe they had been exposed to toxins, and he had no evidence of toxic exposure, other than his own *ipse dixit* that the test scores for the controls were also "abnormal."[3] (Joint App. Vol. III, pp. 1296, 1335, 1437-38).

- Dr. Kilburn has been excluded by at least ten other courts, in cases where his methodology was actually challenged, because his "methodology" was found lacking.[4] (Appellee's Final Brief on Appeal at 21-24, Appellee's Addendum).

Petitioners support their argument that the doctors' methodologies were accepted in mainstream science with a mere assemblage of medical literature excerpts that mention statistical analysis (Pet. at 6, 25), dose-response relationships (Pet. at 3-5, 8-10, 17), confounders (Pet. at 3), testing (Pet. at 4, 10, 16-17), and unsupported assertions that the doctors' works were peer-reviewed and published.[5]

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3. Because Dr. Kilburn did not review the plaintiffs' medical history records and was unaware of the many confounders shown in their medical histories, he also failed to match properly his control group to the allegedly PCB-exposed plaintiffs in his Lobelville study. *See* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 352-54 (2nd ed. 2000).

4. The record below does not contain Petitioners' list of cases in which Dr. Kilburn was purportedly admitted. (Pet. at 23-24).

5. There is no evidence in the record below of the article cited by Petitioners that was purportedly published in *Neurotoxicology* in April of 2000, much less evidence that it was peer-reviewed. (Pet. at 15-16).

(Pet. at 11-16). The recitation of materials is without further context or explanation with regard to Petitioners. The assemblage does not establish that the doctors' methodologies were sound generally and does not prove that the methodologies allowed the doctors to establish specific causation with regard to these Petitioners.

Nowhere in their Petition for Writ of Certiorari do Petitioners allege that the District Court improperly conducted a Federal Rule of Evidence 702 inquiry, misstated this Court's guidelines for conducting the inquiry, or utilized inappropriate factors in performing the inquiry. Petitioners' argument is simply that both the District Court and the Sixth Circuit reached the wrong result. Nevertheless, even the misapplication of a properly stated rule of law is not grounds for a grant of certiorari. *See* SUP. CT. R. 10.[6] The record, however, is abundantly clear that the District Court's Rule 702 inquiry and the Sixth Circuit's review of that inquiry are not flawed.

Because Petitioners fail to assert or prove any compelling reason for this Court to review the well reasoned decisions of the lower courts, their Petition should be denied.

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6. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

II. The Sixth Circuit and the District Court Correctly Applied Federal Rule of Evidence 702 and the *Daubert* Factors.

The Sixth Circuit and the District Court both identified the correct rules of law and applied them in the case below. The District Court did not abuse its discretion in excluding the testimony of Drs. Kilburn and Hirsch and subsequently granting summary judgment to Respondents, and the Sixth Circuit did not err in affirming the District Court. Thus, the lack of error below militates in favor of denial of certiorari.

Petitioners had the burden in the District Court of establishing the admissibility of the testimony of Drs. Kilburn and Hirsch. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993). To prevail at the Sixth Circuit, Petitioners would have had to demonstrate that the District Court abused its discretion in concluding the Petitioners had not met their burden and, therefore, in granting Respondents' motions to exclude. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). Lower courts have "broad latitude" over the exclusion or admission of expert testimony under the abuse of discretion standard. *See Kumho Tire*, 526 U.S. at 142. At the appellate level, "deference . . . is the hallmark of abuse-of-discretion review." *Joiner*, 522 U.S. at 143.

Federal Rule of Evidence 702 governs the admissibility of expert evidence.[7] In *Daubert*, this Court established the

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7. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

(Cont'd)

current standard for determining the admissibility of scientific evidence under Rule 702. This Court ruled in *Daubert* that trial courts must act as "gatekeepers" and ensure that expert testimony satisfies a two-pronged test to be admissible. *Daubert*, 509 U.S. at 592.

The *Daubert* two-pronged inquiry consists of the following steps:

- First, the court must determine whether the expert's testimony reflects " 'scientific knowledge' . . . derived by the scientific method," *id.* at 590, and thus represents "good science," *id.* at 593.

- Second, the court must ensure that the proffered testimony is "relevant to the task at hand," *id.* at 597, so that it "will assist the trier of fact to understand or determine a fact in issue," *id.* at 592.

Subsequent to *Daubert*, in *General Electric Co. v. Joiner*, this Court reiterated that courts have a " 'gatekeeper' role" pursuant to which they " 'must ensure that any and all scientific testimony or evidence admitted is not only relevant,

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(Cont'd)

> qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

but reliable.' " 522 U.S. at 142 (quoting *Daubert*, 509 U.S. at 589). Finally, in *Kumho Tire Co. v. Carmichael*, this Court reaffirmed that "Federal Rule of Evidence 702 imposes a special obligation upon a trial judge" to ensure that scientific evidence meets the two-pronged reliability and relevance test. 526 U.S. at 147; *see also Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (expert opinion must meet "exacting standards of reliability"). Under these standards, this Court and many courts of appeal have affirmed the exclusion of experts in PCB cases in particular and in toxic tort and other cases in general. *See, e.g.*, *Joiner*, 522 U.S. at 136 (PCBs); *Daubert*, 509 U.S. at 579 (prescription drugs).

Although this Court in *Daubert* emphasized that a trial court's inquiry under Rule 702 is "a flexible one," *Daubert*, 509 U.S. at 594, the Court also set forth four factors that may be relevant to the inquiry. These factors include (1) whether a theory can be or has been tested; (2) whether a theory has been subjected to peer review and publication; (3) the known or potential rate of error of a technique; and (4) general acceptance of a theory. *Id.* at 593-94. This Court also noted, "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593.

In conducting its Rule 702 inquiry, the District Court used a combination of *Daubert* factors and other factors in evaluating the scientific methodologies of Drs. Kilburn and Hirsch. The factors considered by the District Court included: (1) whether the experts considered confounding factors for Petitioners' alleged injuries; (2) whether the experts considered the temporal relationship between exposure to PCBs and the alleged injuries; (3) whether the experts established that petitioners received a dose of PCBs sufficient

to cause illness; (4) whether the experts' opinions were generally accepted in the scientific community; (5) whether Dr. Kilburn's so-called epidemiological study involving Petitioners was properly conducted, much less published or peer reviewed; and (6) whether the experts' studies and theories were developed for purposes of the litigation and whether Petitioners' attorneys funded these studies. *Nelson*, 1998 U.S. Dist. LEXIS 22,769 at *13-*39.

Far from abusing its discretion, as the Petitioners assert, the District Court conducted its Rule 702 inquiry as envisioned by this Court in *Daubert*, *Joiner*, and *Kumho Tire*. The District Court performed a thorough Rule 702 inquiry, and after an exhaustive *Daubert* analysis, properly excluded Drs. Kilburn and Hirsch as expert witnesses. The Sixth Circuit, in affirming the District Court's decision, expressly found: "After careful review of the voluminous record in this matter and the extensive arguments of the parties, we are convinced that the magistrate judge did not abuse his discretion in determining that the testimony of plaintiffs' expert witnesses was not grounded upon valid scientific methodology and was not reliable." *Nelson*, 243 F.3d at 251.

Because Petitioners have cited no departure from the accepted course of judicial proceedings and no departure from any settled, applicable law, their Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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